69-80Cons.
69-140)Cases

125 I.A. 220

ABST.

UNITED STATES OF AMERICA

State of Illinois )
Appellate Court ) ss:
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable CHARLES H. DAVIS, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On June 29, 1970 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Nos. 69-8 and 69-140

Abstract

FILED

JUN 29 1970

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

| | | |
|---|---|---|
| ROY E. ANDERSON, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | Appeal from the Circuit |
| | ) | Court for the Sixteenth |
| WILLIAM ELDEN and JENNIE LONG, | ) | Judicial Circuit, DeKalb |
| | ) | County, Illinois. |
| | ) | |
| Defendants-Appellants. | ) | |

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

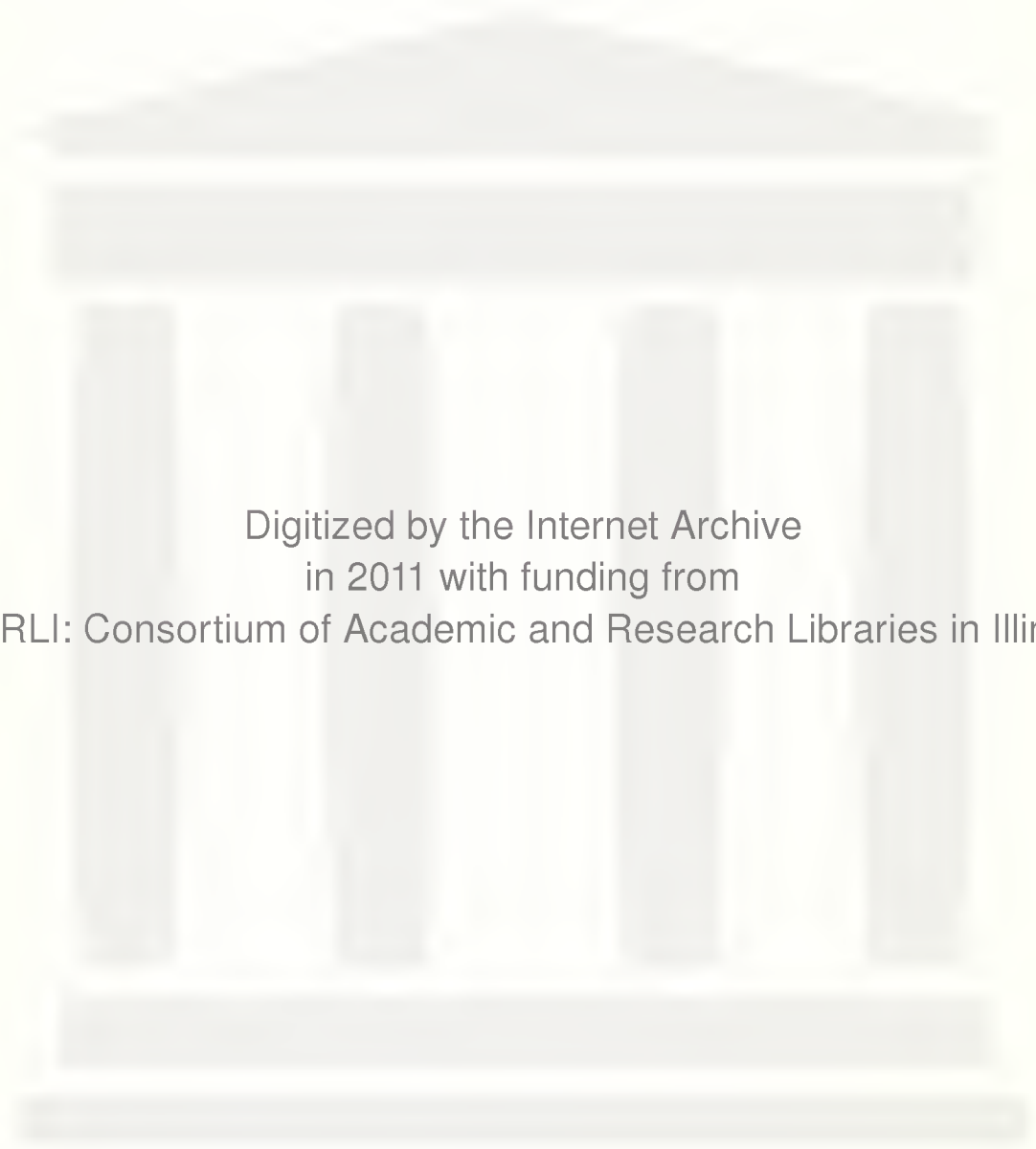
The plaintiff, Roy E. Anderson, brought suit against defendants, Jennie Long and William Elden, for a brokerage commission in regard to a sale of a 210 acre farm owned by Elden to one Henry Fisher and his family. The farm is located outside Sycamore in DeKalb County. At the conclusion of the trial, the jury returned a verdict in favor of Anderson as against Elden and in favor of Jennie Long as against Anderson. We originally held that Elden failed to perfect his appeal from that judgment within the time proscribed but our decision was reversed by the Supreme Court and the cause remanded to us to consider the appeal. Accordingly, we conclude that it was the opinion of the Supreme Court that the appeal was brought within the proper time limit and will not consider that question further.

Roy Anderson testified that he was a licensed real estate broker engaged in that business in several counties in northern Illinois, including

DeKalb County. He first met Jennie Long in 1963 when she and her husband, since deceased, were interested in the sale of their farm. Anderson subsequently showed Mrs. Long 20 or 30 farms for sale in northern Illinois after the death of her husband. On or about November 1, 1965, Mrs. Long called Anderson and advised him that she wished to sell her farm on Mt. Hunger Road outside of Sycamore. Anderson drove out to the farm and met Mrs. Long who resided in one of two houses on the property. She gave him various items of pertinent information such as the amount of the taxes, the acreage, the balance of the existing mortgage, the interest rate and the name of the mortgagee, which information Anderson noted on a multiple listing pool form. She also informed Anderson that she owned the farm and wished to sell it for $750 an acre but that all offers should go through her adopted son, William Elden, an attorney. Anderson said that the commission would be 6% in the event of a sale and she answered "Yes, we will pay the commission."

Anderson thereafter included the farm in advertisements placed in area newspapers and showed the farm to approximately 25 to 40 prospective purchasers. On each occasion, he would introduce his prospect to Mrs. Long as the owner of the farm and she would take their names and addresses. In February, 1966, Anderson called Elden by telephone, introduced himself and advised that he had obtained a prospective purchaser and expected a written offer for the property in the near future. He testified that Elden responded "Send him in. We'll look at it." No written offer, however, was made at that time.

Mrs. Long continued to telephone Anderson at least once a week to inquire about his progress and repeat her expressed desire to sell the farm. On September 5, 1966, Henry Fisher contacted Anderson



at his home in response to an advertisement for a farm in Gilberts, Illinois. Anderson showed Fisher and his brother a number of dairy farms in the area on that date. The last farm they visited was the "Long" farm where Anderson introduced the Fishers to Mrs. Long as the owner and, in accordance with her usual procedure, she noted their names and address. The Fishers looked at the farm for approximately 1 and 1/2 hours but told Anderson that they were not interested in it. Anderson made several subsequent telephone calls to Henry Fisher who did not answer or return his calls. In March of 1967 Anderson brought another prospect to the farm and found Bernard Fisher cleaning up the yard. He subsequently learned that the farm had been sold by Elden to the Fishers in October of 1966.

Henry Fisher appeared in response to a subpoena and testified that he called Anderson in 1966 in regard to a newspaper ad for the sale of farms. Fisher and his brother then went with Anderson to inspect various farms in the Elgin and Dundee areas including the farm occupied by Mrs. Long. They were not previously acquainted with her or with Elden. They discussed the farm with her on that occasion and she urged them to purchase it. Although Fisher did not recall any conversation directly concerned with ownership of the farm, he had the "impression" that Mrs. Long was the owner. Fisher had no further contact with Anderson but received a telephone call from Mrs. Long two or three weeks later. She again urged Fisher to purchase the farm and suggested he contact Elden as "he would be handling it." Fisher received 3 or 4 more calls from Mrs. Long and revisited the farm with his brother and sister. The Fishers decided to buy the property and, at Mrs. Long's direction, went to Elden's home and were informed, for the first time, that he was

the owner of the farm. After a number of meetings, the Fishers purchased it for $650 an acre. At one point in the negotiations, the Fishers brought up Anderson's name and were told by Elden that he "never heard of him."

Jennie Long testified as an adverse witness and her testimony was, to say the least, confusing. She stated that Anderson was "going house to house to look for farms" and that she told him "Go". . ."the farm not mine" . . ."I pay rent". She denied that she ever told Anderson or anyone else that she was the owner of the farm; denied that she employed Anderson to sell the farm or furnished, or indeed, possessed, any information relative to it; denied that she took anyone's phone number; and denied that she called the Fishers. She did state, however, that the Fishers were first brought to the farm by Anderson. She also stated that Elden was a friend of her son since their childhood but that he was not related to her.

Elden testified that he owned the farm since 1964, that Jennie Long lived on it as a tenant since 1965 and that he knew her for 38 years but that they were not related. He stated that he never authorized Mrs. Long to attempt to sell the farm or to engage the services of a broker. He denied that he had a telephone conversation with Anderson in February of 1966 or that he had any contact with or knowledge of Anderson at any time prior to the commencement of the litigation. Elden said he first met the Fishers in September of 1966 when they came to his home and offered to buy the farm. He was not aware of how the Fishers learned of the farm or his interest in it. He did sell it to them in October, 1966, for $137,000. Judgment in the amount of $8,000 was entered on the verdict in favor of Anderson as against Elden.

On appeal, Elden contends that there was no evidence of any contract between Anderson and himself and therefore Anderson could not be entitled to a commission; that a finding by the jury in favor of Jennie Long necessarily absolved him of any liability; that the court erroneously refused to give a certain instruction that he had tendered; and that Anderson was not the procuring factor in the sale.

It is true that the relationship of agency between an owner of property and a real estate broker depends on a contract of employment between them. However, it is not necessary that the contract be written or even orally expressed but it can be implied from the conduct of the parties. Young v. Zimmer, 56 Ill. App 2d 298, 303, 304; Doss v Kirk, 8 Ill. App 2d 536, 539.

An examination of the facts of this case in the light of this general rule of law supports the conclusion that Anderson was in fact employed to procure a purchaser for the farm. The evidence in regard to his original visit, his repeated efforts to interest prospective buyers, and his regular communications with Jennie Long in regard to a sale was largely uncontradicted. Jennie was aware that Anderson was in the business of selling farms in the area and although she denied that she ever employed him to find a buyer, her conduct was thoroughly consistent with Anderson's contention that he had been so employed.

Jennie Long was not, however, the owner of the farm and therefore would ordinarily have no authority to employ anyone to sell it. Elden, the actual owner, could only be liable on Jennie's contract to employ Anderson if he in fact authorized her to employ him on his behalf, or, if with knowledge that she had so acted, he ratified that act.

A ratification of an otherwise unauthorized act by a purported agent has been defined in Karetzkis v. Cosmopolitan Nat. Bank, 37 Ill. App. 2d 484, at 490 as follows:

> "Ratification may be express, or it may be inferred from circumstances which the law considers equivalent to an express ratification. In the latter sense, ratification may be found to have taken place when the principal, with knowledge of the material facts of the unauthorized transaction, takes a position inconsistent with nonaffirmation of the transaction. An example of such ratification is for the principal to seek or retain the benefits of the transaction."

Thus, Elden could be liable as an undisclosed principal to Anderson on the contract of employment made by and between Anderson and Jennie even if Jennie had no authority to act on behalf of Elden if Elden was aware of the contract and ratified it through his retention of the benefits. Buford v. Chief, Park Dist. Police, 18 Ill. 2d 265, 270; Lawcock v. United States Trotting Ass'n., 55 Ill. App. 2d 211, 219; Ault v. Associates Discount Corp., 43 Ill. App. 2d 409, 414.

As we have seen, Anderson testified that he talked to Elden in February of 1966, identified himself and stated that he thought he had a purchaser for the property. If, in fact, such a conversation had taken place, Elden could have informed Anderson that he was the owner of the farm and repudiated any unauthorized agreements made by Jennie Long. The ultimate purchaser, Henry Fisher, also testified that Anderson's role in the transaction was brought up during negotiations with Elden but that he denied any knowledge of him. Although Elden denied any conversations or other contacts with Anderson of any nature whatsoever, the contradiction in the testimony in that, and other respects was for the resolution of the jury. There is no

contention that the evident resolution of that contradiction was against the manifest weigh t of the evidence, nor does it appear to be, so we must conclude that the determination of the jury that Elden was aware that Anderson was employed to find a purchaser was legally sound.

It then remains to determine if Elden, aware of Jennie's employment of Anderson, ratified that employment by his retention of the benefits thereof, or to consider the precise issue raised in Elden's brief, was Anderson the "procuring factor" in the sale. The evidence was uncontradicted that the Fishers responded to an advertisement placed by Anderson, that they went with him to inspect several farms and first learned of and visited Elden's farm through his efforts. One of the few coherent facts that can be gleaned from the testimony of Jennie was that the Fishers first came to the farm accompanied by Anderson.

If a broker is instrumental in bringing together a seller and purchaser and a sale is consummated, he will be considered the procuring cause of the sale and, if so employed, be entitled to his commission. Doss v. Kirk, ibid. Under the circumstances, there can be no doubt that Anderson was the instrument that brought Elden and the Fishers together and that he was the procuring cause of the sale. Elden's contention that Anderson "abandoned" his interest in the Fisher transaction is without merit.

The argument that the determination by the jury that Jennie Long was not liable on the contract necessarily absolves her undisclosed principal is a misstatement of the law. If, as here, a third

party learns of the existence of an undisclosed principal, he may pursue his remedies against either the agent or the undisclosed principal but not both. Capitol Hardware Mfg. Co., v. Naponiello, 345 Ill. App 272, 275. This rule is a necessary correlant to the general law that an agent is not personally liable on contracts made on behalf of his principal unless he acts beyond the scope of his authority. Fieschko v. Herlich, 32 Ill. App. 2d 280, 285.

The appellant offered the following instruction that was not given by the trial court:

> "Plaintiff has the burden of proving all the following:
>
> 1. That he had a contract with Jennie Long.
>
> 2. That Jennie Long was the agent of William Elden as proved by the testimony of William Elden.
>
> 3. That Jennie Long had the specific authority from William Elden to sell the farm; and to hire a broker to sell the farm, as proved by the testimony of William Elden.
>
> 4. That Plaintiff provided a purchaser for the farm.
>
> 5. That William Elden had full knowledge of all of the facts.
>
> 6. Or that in the alternative William Elden hired Plaintiff as his broker.
>
> If you find from your consideration of all of the evidence that each of the propositions has been proved, then your verdict should be for the Plaintiff, but if on the other hand, you find from your consideration of all of the evidence, that any one of these propositions has not been proved, then your verdict should be for the Defendants."

It is obvious from our discussion of the other points raised in this appeal that the instruction was not a correct statement of the law and was properly refused by the court. In any event, the complete

instructions are not furnished for our examination and it is well established that a court of review will not consider isolated instructions unless all are available for a complete determination of whether the jury has been properly instructed. Johnson v. Cunningham, 104 Ill. App. 2d 406, 414; People v. Habdas, 94 Ill. App. 2d 330, 339.

For the reasons stated, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

DAVIS, P. J. and SEIDENFELD, J., concur.

UNITED STATES OF AMERICA

State of Illinois )
Appellate Court ) ss:
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable CHARLES H. DAVIS, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On July 2, 1970 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 69-177

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>KENNETH WICK,<br><br>Defendant-Appellant. | ) | Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois. |

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The defendant, Kenneth Wick, was charged by indictment returned by the grand jury of Lake County with the offense of criminal damage to property in that he knowingly damaged three black walnut trees owned by George and Herman Holtz without their consent and with the offense of theft in that he knowingly obtained unauthorized control over the trees with the intent to permanently deprive the owners of them. The defendant entered pleas of not guilty to each charge and, after a trial, the jury returned a verdict of guilty on both counts. Wick was sentenced to three years probation on each count with the first six months to be served at the state

farm at Vandalia. On appeal, the defendant contends that the evidence did not prove his guilt beyond a reasonable doubt and that the jury was improperly instructed.

At approximately 12:00 noon on January 3, 1968, Wick and two companions drove to the home of Ella Cribs in Mundelein, Illinois. It was a cold day with a temperature of around 10° below zero and there was 4 to 6 inches of snow on the ground. Wick went to the door of the Cribs' home and identified himself to Mrs. Cribs with a card that bore his name and advised her that he had permission to cut and remove fallen trees from the Holtz property that adjoined that owned by the Cribs. He further informed her that she would hear his saws used to cut the trees. The Cribs property is about 15 acres in size and the vacant Holtz parcel approximately 21 acres.

Ella Cribs telephoned her friend, Ruth Goodsell, the daughter of George Holtz, and informed her of the conversation with Wick. Ruth contacted her father in Trevor, Wisconsin and learned that he had given no one permission to enter his property or remove any wood. At approximately 3:00 P.M., Elwood Goodsell, the husband of Ruth, went onto the Holtz property and found Wick and his companions near a flat bed truck that had broken down at the edge of the property. Goodsell observed three black walnut logs, each approximately 30 inches in diameter and 16-18 feet long, chained on the bed of the truck and saws near the truck. He approached the men and inquired who was "the boss of this sawing operation". Wick replied that he was the "boss" and that he had received the permission to remove the wood from a Holtz' relative named "Benny" from Wheeling.

Goodsell requested that Wick return to the Cribs home with him to contact Mr. Holtz and Wick did so accompany him.

Goodsell telephoned his father-in-law in Wisconsin and also learned that no permission had in fact been given and, at the instructions of George Holtz, then called the county sheriff. Wick waited with Goodsell for the sheriff to arrive but did return to the truck to bring his friends in out of the cold. He also drove his car to a service station but returned before the sheriff. He was arrested and advised not to remove the truck or logs.

Goodsell returned to the truck and observed that a barbed wire fence that enclosed the Holtz property had been freshly cut and that the truck was disabled at a point halfway through the opening in the fence. He followed tire tracks from the truck through the snow back into the woods approximately 250-300 feet to a grove of walnut trees and saw that a number of small trees had been cut and thrown to the side of the tire tracks. The tracks ended near the stump of three trees cut about 2 to 3 inches from the ground and there was fresh sawdust in the area. The tops of the walnut trees were left, with the branches, and measured from 30 to 45 feet in length. One top had caught in the branches of another tree and was suspended in the air.

Ruth Goodsell visited the property the following day with her husband and also observed the cut barbed wire fence and the fresh sawdust at the stumps in the walnut tree glade. However, the truck and logs had been removed.

Herman Holtz testified that he was one of the owners of the trees and that Wick had no permission to remove them or to go upon the land. A horticulturist testified that three walnut trees of the size and condition of those removed would be worth approximately $6,000.00.

In his defense, Wick testified that he had a conversation in the Hilltop tavern in Wheeling a few days prior to the incident with a casual acquaintance known as either "Barney","Bernie" or Benny". "Benny" told him that he was authorized to remove wood from the Holtz property and that Wick could do the same. On January 3, Wick visited the township assessor to ascertain the exact location of the Holtz parcel and drove there in a truck owned by a Bill Barnes with his companions, Bill Cokenower and Ron Nordstrom. They first stopped at the home of one Joe Perry and obtained permission to drive across his property to reach the trees on the Holtz land.

Wick denied that they cut the fence at the property line but said it was "down" at the point they drove onto the land. He also denied that they cut the walnut trees down but said they were already down and on the ground when they reached the glade. Wick did recall that he told Goodsell that he had permission from Benny to remove the trees but denied that he identified himself as the "boss of the operation". Wick stated that he did not return to the truck after his arrest and never saw the truck or logs again.

Joe Perry confirmed that Wick had sought his permission to

cross his property on January 3, but Cokenower and Nordstrom, called as witnesses for the defense, refused to testify.

The defendant is of the opinion that the facts as thus disclosed do not establish his guilt beyond a reasonable doubt since his conduct was not that of a man who knowingly intended to damage or steal property. In particular, he calls attention to the fact that he went to the assessor's office, where he was known, and inquired as to the location of the Holtz farm; that he identified himself to Perry and announced his purpose to remove wood; and, finally, as the coup de grace, that he left his card with Ella Cribs and told her he was about to cut and remove trees. All of these actions, it is argued, are utterly inconsistent with an intention to damage or remove property without the permission of the owner. Wick admits his actions were rash, ill-advised, perhaps even stupid, but hardly criminal. The jury, obviously, felt otherwise.

It would be possible, however, to consider the candor of the defendant in a different aspect. It was obviously impossible to drive a flat bed truck capable of hauling 16 foot logs anywhere with any degree of stealth. It is equally obvious that the sounds of a power saw would be heard by anyone in the vicinity. In this aspect, Wick's conduct could be considered as a shrewd contrivance to avert suspician from activities that he could in no event completely hide. It is significant that he contacted the assessor and neighboring landowners but made no effort to reach any members of the Holtz family to substantiate the permission given by "Benny".

It is also interesting to note that under circumstances more favorable to the defendant, the removal of the walnut trees might not have been noticed by the owners until they next inspected the property.

In any event, it was the testimony of the defendant that he thought he had the authority to enter onto the Holtz property and cut and remove fallen trees. His conversations with Perry and Ella Cribs were to this effect and he denied that he or his companions cut down the walnut trees. As we have seen, there was considerable evidence that contradicted that testimony. It is of course well established that a conflict in the evidence will not necessarily of itself be sufficient to raise a reasonable doubt. The People v. Sudduth, 14 Ill. 2d 605, 609. It was up to the jury to observe the witnesses, determine their credibility, weigh the testimony and resolve any conflicts in the evidence. The People v. Jordan, 18 Ill. 2d 489, 493. We feel that the evidence before the jury in this case established the guilt of the defendant beyond a reasonable doubt.

The defendant next argues that the cause should be reversed because the jury was not instructed as to the definitions of "knowingly" and "intent" and that they were essential elements of the crimes charged. Although the conference on instructions has not been abstracted for our examination, it is admitted that the defendant did not offer instructions on those definitions or argue to the trial court that such instructions should be given.

It is also admitted that the defendant did not raise this point in his post-trial motion for judgment notwithstanding the verdict or for a new trial. Ordinarily the failure to raise an alleged error either during trial or in post-trial motions is deemed a waiver. The People v. Irwin, 32 Ill. 2d 441, 443; The People v. Hunter, 23 Ill. 2d 177, 178; People v. Dell, 77 Ill. App. 2d 318, 325. However, the defendant cites the case of People v. Davis, 74 Ill. App. 2d 450, to the effect that the trial court has the responsibility to instruct the jury as to the essential elements of a crime to prevent fundamental error even where such instructions have not been requested by either party.

In the Davis case, the defendant was charged with the offense of an attempt to commit robbery. The State tendered an instruction that was given that set forth the statutory definition of an attempt as follows:

> "The jury are instructed that a person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense..."

However, no instruction was tendered or given as to the elements of the "specific offense", robbery, nor was the word robbery even mentioned, and the court concluded that without such additional aid the instruction given was meaningless. The court then held that even where there was no prior objection or assignment of error, the failure to instruct the jury as to the elements of the crime of robbery was reversible error since it was "...vital to veriest function of a jury...". The court added that without such an

instruction the jury would be "free to improvise its own concept of the crime or crimes charged."

In our case, the jury was given the Illinois Pattern Jury Instruction Nos. 13.01, 13.02, 16.01, and 16.02. Those instructions defined the crimes of theft and criminal damage to property and the essential elements to be proved to sustain either charge.

Under the circumstances, we cannot agree that the court had the responsibility to further instruct the jury as to the specific definitions of "knowingly" or "intent" or that the failure to do so was a denial of fundamental justice. We therefore conclude that the failure to raise this point in the trial court waived the right to raise it before us for the first time.

For the reasons given, the judgment of the trial court will be affirmed.

AFFIRMED.

DAVIS, P. J. and SEIDENFELD, J. Concur.

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy, within and for the Third District of Illinois:

Present—

HONORABLE HOWARD C. RYAN, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE JAY J. ALLOY, Justice

JOHN E. HALL, Clerk

WAYNE HESS , Sheriff

BE IT REMEMBERED, that afterwards on July 9, 1970 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Case No. 69-111



In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1970

| | |
|---|---|
| FIRST NATIONAL BANK AND TRUST CO. OF PEKIN,<br><br>Plaintiff-Appellee<br><br>vs.<br><br>GLENN VAN HILSEN and HAROLD VAN HILSEN,<br><br>Defendants-Appellants | Appeal from the Circuit Court of Tazewell County, Illinois<br><br>Honorable Ivan L. Yontz Associate Circuit Judge, Presiding. |

STOUDER, J.

Abstract

This is an appeal by Defendants, Glenn Van Hilsen and Harold Van Hilsen, from an order of the Circuit Court of Tazewell County refusing to vacate a judgment by confession in favor of Plaintiff, First National Bank and Trust Co. of Pekin, in the amount of $40,714.03. The judgment included $2,343.53 as attorney fees and according to defendants as set forth in their motion to vacate the judgment, the court was without jurisdiction to include such attorney fees.

The promissory note upon which this action is based contained a warrant of attorney provision including authorization for reasonable attorney fees. The only issue presented on this appeal is the propriety of including attorney fees in the judgment.

The only cases cited by either party are Little, et al v. Dyer, 138 Ill. 272, 27 N.E. 905 and M. C. Campbell et al v. Leroy A. Goddard, 117 Ill. 251, 7 N.E. 640, and in our view of this case the trial court's action is justified by the reasoning in the Campbell case, supra.

In the Campbell case the court concluded that the Clerk of the Court being a

non judicial officer had no authority to determine reasonable attorney fees where the warrant of attorney provided that the same could be included in the judgment. In so holding the court concluded that the power to determine reasonable attorney fees was conferred upon the court. Although the court may require evidence to be formally presented it is not required so to do. In any event the record before us fails to disclose any impropriety in the trial court's determination of attorney fees.

For the foregoing reasons the judgment of the Circuit Court of Tazewell County is affirmed.

JUDGMENT AFFIRMED.

Ryan, P.J., and
Alloy, J. concur.

UNITED STATES OF AMERICA

State of Illinois )
Appellate Court ) ss:
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable CHARLES H. DAVIS, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On July 9, 1970 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 69-222 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

| | | |
|---|---|---|
| CITY OF NORTH CHICAGO, a Municipal Corporation of Lake County and the State of Illinois, | ) | |
| Plaintiff-Appellee, | ) | |
| v. | ) | Appeal from the Circuit Court of Lake County, |
| AMELIA J. CONNELL, et al., | ) | Illinois. |
| Defendants, | ) | |
| JOSEPH J. DROBNICK, et al., | ) | |
| Defendants-Appellants. | ) | |

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The defendants appeal from a denial of their petition to vacate a default judgment entered in 1962 in the Circuit Court of Lake County in a condemnation proceeding, alleging that on May 6, 1969, they first discovered that such judgment had been entered against them with reference to a particular piece of property in which they had an interest.

On December 5, 1961, the City of North Chicago filed a petition to condemn 24 parcels of property located in that city naming the Drobnicks among the 89 defendants, who were parties interested, as owners or otherwise. The Drobnicks, Joseph J. and Eleanor A. Drobnick, his wife, Mark J. Drobnick, Trustee, Jerome P. Drobnick and Joseph J. Drobnick, Trustee, alleging to have an interest in Parcel 76 (and other parcels not involved in this appeal) as owners and otherwise, by Mark Drobnick, their attorney, filed on February 1, 1962, their ap-

pearances, jury demand and traverse. A jury awarded compensation of $1,300. for Parcel 76, and on August 15, 1962, the court entered its judgment order fixing compensation of $1,300. and ordered the City to deposit this money with the County Treasurer within 20 days, which deposit was made on August 17, 1962, and partial distribution was made for real estate taxes due and payable.

On May 6, 1969, the defendants filed a petition to vacate the default judgment entered in 1962 under Section 72 of the Civil Practice Act (Ill. Rev. Stat. 1967, ch. 110, sec. 72) stating that they did not receive notice of the trial date, nor did they receive notice of the entry of judgment; that the fair cash market value of the land greatly exceeds the amount of the judgment; and that they have a meritorious defense to the proceedings. Attached to said petition are affidavits of the defendants to the effect that they received no notice of the trial date or entry of judgment; that they are exercising due diligence in seeking relief, and that the fair cash market value of the real estate involved was $7,500.

On June 10, 1969, the City filed a motion to strike and dismiss the petition to vacate on the grounds that it was substantially insufficient in law, failed to comply with Section 2 of Section 72 of the Civil Practice Act and was not brought within the time limited by law. (Ill. Rev. Stat. 1969, ch. 110, sec. 72(3). ) The Drobnicks replied to the City's motion on June 30, 1969, and alleged that the City took judgment by default without notice, and that the petition to vacate "is exempt from the two year bar because the grounds for relief is fraudulently concealed." On July21, 1969, the court entered its order sustaining the City's motion and dismissed the petition. On

August 7, 1969, the Drobnicks filed a petition to vacate the order of July 21 and to reconsider the petition, which the court denied on October 3, 1969. Thereafter, on October 30, 1969, the Drobnicks filed their notice of appeal to the Appellate Court in the Circuit Court of Lake County.

Attached to Drobnicks' brief, filed on March 4, 1970, is a document entitled "Petition for Leave to Appeal" which consists of a prayer, argument and conclusion. It is difficult to understand what the Drobnicks are trying to do by attaching said petition for leave to appeal to their brief, but the same points and authorities and argument set forth in their brief are recited as being adopted in the so-called petition for leave to appeal. The City of North Chicago says such a petition for leave to appeal, as attached to the Drobnicks' brief, is contrary to the Civil Practice Act and the rules of the Illinois Supreme Court and should be stricken. The notice of appeal was properly filed in the Circuit Court and Supreme Court Rule 301 provides that no other step is jurisdictional. Upon the present status of the record we deem it inconsequential that the so-called petition for leave to appeal is attached to an otherwise proper appeal as a matter of right since the appeal is from a final judgment of the Circuit Court.

The petition to vacate the judgment failed to state a cause of action under Section 72 of the Civil Practice Act and therefore was properly dismissed.

In Fennema v. Vander Aa, 42 Ill. 2d 309, it was alleged in a similar proceedings that the plaintiff's attorney did not receive notice of either the pretrial conference, at which the cause was dismissed, or the dismissal of the action. The Circuit Court denied a Section 72

petition and although the Appellate Court reversed and ordered the cause reinstated, the Supreme Court, after granting leave to appeal, reversed the Appellate Court and affirmed the judgment of the Circuit Court stating that the petitioner must allege and prove a right to the relief sought; that where the petition fails to state a cause of action it is subject to motion to dismiss; and that the burden is on the petitioner to allege facts which, if true, show that he is entitled to the relief requested. In that case, the allegation was, as here, that the attorney did not receive notice, but the court pointed out that that allegation is entirely consistent with the fact that adequate notice was given, and held that relief was properly denied in the Section 72 petition.

In the case at bar, the petition and affidavits recite that no notices of trial date and default judgment were received. There is no allegation or affidavit that they were not sent. In Esczuk v. Chicago Transit Authority, 39 Ill. 2d 464, a similar issue was involved and the court held that there were no facts alleged to justify relief under Section 72, and said at page 467 that "It has long been held that once a court acquires jurisdiction, it is the duty of the litigants to follow the case."

The petition to vacate here was filed about six and one-half years after judgment was entered. One of the affidavits attached to the petition states that the defendants are exercising due diligence in seeking relief from the entry of said judgment. However, there are absolutely no factual allegations to substantiate this or to explain why they failed to act for such a long period of time and did not check the court files for six and one-half years. A Section 72 notice is not designed

to relieve a party from the consequences of his own mistake and where the petition fails on its face to show that the petitioner is entitled to the relief sought, it is subject to a motion to dismiss. Brockmeyer v. Duncan, 18 Ill. 2d 502, 505; Thompson v. Carson Pirie Scott & Co., 106 Ill. App. 2d 463, 465.

The Drobnicks contend that the petition to vacate the judgment was not barred by the two year limitation period of Section 72(3) of the Civil Practice Act "because the grounds for relief are fraudulently concealed." This contention is made for the first time in defendants' "Reply to the Motion of the City of North Chicago to Strike and Dismiss the Petition to Vacate Judgment," and was not mentioned in defendants' petition to vacate the judgment or in the affidavits attached thereto.

We have previously noted that the petition to vacate the judgment stated no facts to justify relief under Section 72 and was properly dismissed. The manner in which the defendants attempted to avoid the two year limitation (by a Reply) because "the grounds for relief is fraudulently concealed" was improper. In any event, even if said allegation of fraudulent concealment had been made in the petition to vacate the judgment, said petition would still be insufficient as a matter of law. Alleging conduct is "fraudulent" is a conclusion and must be supported by allegations of fact from which such conclusion is warranted. In Re Estate of Stith, 105 Ill. App. 2d 429, at 437. Such a bare allegation as "fraudulently concealed" presents no facts to even raise an inference of what is fraudulently concealed. It cannot be the judgment, as that is a matter of record and there can be no question that the court had jurisdiction of the subject matter and the parties in this case.

Defendants further contend that their petition is also

brought under the equitable powers of the court and it is true that a Section 72 proceeding does invoke the equitable powers of the court. However, Section 72 does not relieve a party from the consequences of his own mistake or negligence although the equitable powers of the court are invoked by said section. Davis Furniture Co. v. Young, 102 Ill. App. 2d 415, 419. Under the circumstances here present justice and fairness do not require the granting of the petition to vacate the judgment. There are no facts alleged to show such fraud, mistake or fundamental unfairness as would warrant a collateral attack upon this judgment six and one half years after it had been entered. For the reasons stated above, the trial court did not err in dismissing the petition to vacate the judgment. Therefore, the judgment of the Circuit Court of Lake County is affirmed.

JUDGMENT AFFIRMED.

DAVIS, P. J. and SEIDENFELD, J., concur.